

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

AT CHARLESTON

IN RE: BOSTON SCIENTIFIC CORPORATION
PELVIC REPAIR SYSTEM PRODUCTS
LIABILITY LITIGATION

MDL NO.
2:12-MD-2326

and

IN RE: ETHICON, INC. PELVIC REPAIR
SYSTEM PRODUCTS LIABILITY LIGATION

MDL NO.
2:12-MD-2327

December 10, 2013
Huntington, West Virginia

TRANSCRIPT OF TELEPHONIC MOTION HEARING
BEFORE THE HONORABLE CHERYL A. EIFERT
UNITED STATES MAGISTRATE JUDGE

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1 Tuesday, December 10, 2013, at 2:47 p.m. in courtroom

2 MS. TATMAN: Hello, everybody. This is Laura, Judge
3 Eifert's assistant, and today --

4 UNIDENTIFIED SPEAKER: Hi, Laura.

5 MS. TATMAN: Hi. Today we have Terry Ruffner as the
6 court reporter, and we also have -- we also have Courtflow.
7 So if I might, perhaps we could start with identifying Ethicon
8 plaintiffs' counsel.

9 MR. AYLSTOCK: Hi, Laura. This is Bryan Aylstock on
10 behalf of Ethicon plaintiffs.

11 MS. TATMAN: All right.

12 MR. BALEFSKY: This is -- Laura, this is Lee
13 Balefsky from Kline & Specter, along with Roger Cameron from
14 Kline & Specter, on behalf of the plaintiffs.

15 MS. TATMAN: All right. Thank you. Now, for Boston
16 Scientific plaintiffs, who do we have, please?

17 MS. WAGSTAFF: This is Aimee Wagstaff -- good
18 afternoon -- on behalf of Boston Scientific plaintiffs in the
19 MDL 2326.

20 MS. TATMAN: Thank you. Excuse me. And who do we
21 have for Secant today?

22 MR. TUCKER: Joe Tucker and Amanda Witts on behalf
23 of Secant in the transferred matter to the MDL.

24 MS. STUBBS: Jennise Stubbs with Shook, Hardy &
25 Bacon on behalf of Secant as to MDL 2326.

1 MS. TATMAN: All right. Thank you. Okay. And for
2 defendant Ethicon?

3 MR. WATSON: For defendant Ethicon, Ben Watson and
4 Paul Rosenblatt with Butler Snow.

5 THE REPORTER: Ben Watson and --

6 MS. TATMAN: Ben Watson and -- I'm sorry -- who was
7 the other gentleman?

8 MR. WATSON: Paul Rosenblatt.

9 MS. TATMAN: Thank you. And for defendant Boston
10 Scientific?

11 MR. STRONGMAN: This is Jon Strongman for Boston
12 Scientific from Shook, Hardy & Bacon.

13 MS. TATMAN: All right. Thank you, everyone. If
14 you'll hold one moment, I will get Judge Eifert.

15 UNIDENTIFIED SPEAKER: Thank you.

16 THE COURT: Good afternoon.

17 UNIDENTIFIED SPEAKER: Good afternoon, Your Honor.

18 UNIDENTIFIED SPEAKER: Good afternoon.

19 THE COURT: We do have a court reporter here today,
20 Terry Ruffner. So if you would all identify yourselves for
21 the record when you speak, I would appreciate it.

22 Let me ask, first of all, where are we with Secont -- or
23 Secant -- where are we with its involvement in the Boston
24 Scientific litigation?

25 MS. STUBBS: Your Honor, Jennise Stubbs for Shook,

1 Hardy & Bacon on behalf of Secant for MDL 2326. On
2 December 5th, the JPML heard and considered 26 cases
3 involving Secant for transfer to the Boston Scientific MDL,
4 and we are waiting, awaiting word from them on their ruling of
5 transfer. We expect that any day.

6 THE COURT: Okay.

7 MS. STUBBS: We also have 12 additional cases
8 involving Secant and Boston Scientific products that have been
9 removed to federal court and are pending transfer.

10 THE COURT: Let me ask you all, in view of this
11 recent order entered by the judge in Pennsylvania, what are
12 your positions on the motions pending here in the MDL?

13 MR. TUCKER: This is Joe Tucker, Your Honor, on
14 behalf of Secant in the state court matter. This -- it's
15 because of this order and the direction that the state court
16 judge needs that we really believe that a decision by Judge
17 Goodwin would be true guidance for the state court judge.

18 I think we have -- you know, Judge Goodwin, who's
19 uniquely qualified because he appreciates all the issues in
20 the case, that, you know, when he makes a decision, which is
21 why we also believe that the stay should stay in place, it can
22 give further direction to the state court judge.

23 Secant, unfortunately, is involved with responding to 62
24 broad discovery requests. We've written the judge a letter to
25 help clarify that, but, again, without direction from Judge

1 Goodwin on Secant's status on our motion to dismiss, we're
2 left in this *ad hoc* opinions from different judges. And I
3 believe once direction is given by Judge Goodwin on Secant's
4 status, that will help clear up a lot of the issues as of the
5 latency --

6 UNIDENTIFIED SPEAKER: Your Honor --

7 THE COURT: I think my question --

8 UNIDENTIFIED SPEAKER: I'm sorry.

9 THE COURT: My question, though, is -- goes more to
10 the practicalities. Now you have an order from a judge in
11 Pennsylvania requiring Secant to comply with a myriad of
12 discovery requests. How does that not affect your motion to
13 stay in this court since you're going to have to supply a good
14 bit of the information that the plaintiffs want in this case,
15 in these cases?

16 MR. TUCKER: This is Joe Tucker again on behalf of
17 Secant. We can supply in the MDL the case -- the information
18 that we are providing in the state court, but we are not
19 providing it in what -- in the 20 days, which would actually
20 be Christmas Day, according to the state court judge, the
21 documents. And those documents were more responsive to the
22 issues of the affiant who executed the affidavit for the
23 initial preliminary motion, the preliminary objections, which
24 is a state court equivalent of a motion to dismiss.

25 The issue with the federal court, the MDL, is Secant

1 doesn't know its status as a defendant or as a third party
2 defendant. Because of Judge Goodwin's ruling as a third party
3 to this, we'd have different objections than we would have as
4 an actual defendant. That's why, again, I respectfully circle
5 back that, you know, some direction from Judge Goodwin as to
6 Secant's status would clear a lot of this up. And we don't
7 think that Judge Goodwin would be too long in making that
8 decision. In the interim, we are willing to produce those
9 documents which were produced in the state court in the MDL.

10 MS. STUBBS: Your Honor, Jennise Stubbs for Secant.
11 I want to interject here that the order that has been issued
12 in the Philadelphia state court is in a case that does not
13 involve Boston Scientific products, and there has not been an
14 order issued in Philadelphia state court requiring Secant to
15 produce any documents related to its role in the manufacturing
16 of Boston Scientific products.

17 THE COURT: Well --

18 MS. STUBBS: So the issue still remains that Secant
19 perhaps, you know, at this time may not be a party in the MDL
20 2326 but will be a party very soon based on the transfer of
21 the 26 cases that we believe will occur any day now.

22 And in addition to that, the -- Secant is a party in the
23 MDL 2327 as to Boston Scientific products, which is the same
24 subject matter that the third party subpoena covers. So they
25 are interrelated.

1 THE COURT: Well, I -- here are issues that I see:
2 I see -- I see the statute, and the statute applies in the
3 Ethicon MDL. I see, however, in an Ethicon case, you've been
4 instructed to produce what I thought was quite a bit of
5 information. Maybe I don't have the right deposition notice.

6 The notice attached to the documents I have include --
7 included a number of documents that have to be produced, a
8 wide range of documents. So I see that on the one hand you've
9 got the statute in the Ethicon MDL because you are a defendant
10 and apparently you have made a motion to dismiss on the basis
11 that you're not a manufacturer, but you have this outstanding
12 order where you have to produce a bunch of things.

13 Then you've got the Boston Scientific MDL. Sitting here
14 today you're not a defendant in that case, so you don't have
15 the benefit of the statute.

16 So from a practical standpoint, I think my question to
17 you is, how many times do you want to have the same discovery
18 done, and how many times do you want to put this same person
19 up for deposition, and is there not a more practical way to
20 address this since it looks like you're going to have to do
21 some sort of discovery?

22 Now, I don't know -- I don't know --

23 MR. TUCKER: Judge, this is Joe Tucker on behalf of
24 Secant.

25 THE COURT: Will you please let me just finish here?

1 MR. TUCKER: I'm sorry. I apologize. I thought you
2 had. I apologize.

3 THE COURT: No. What I was going to add was you may
4 have different information than I do about where Judge Goodwin
5 is on ruling on these motions to dismiss. I have no
6 information that he is poised to rule on that motion or those
7 motions any time soon. Maybe he is and I'm just unaware of
8 that. So you might want to enlighten me on that as well.

9 MR. BALEFSKY: Your Honor, this is Lee Balefsky from
10 Kline & Specter on behalf of the plaintiffs in the MDL, and we
11 represent the plaintiffs in the Philadelphia action, the
12 Hansen case. We also represent the plaintiffs in the cases
13 that have been transferred to the MDL, the Hammons, Delacruz,
14 and Musewicz cases.

15 There's just a -- there's several points I can make in
16 response to what Mr. Tucker said, but I believe Your Honor is
17 correct; the bottom line is that discovery is proceeding
18 against Secant in the Philadelphia Court of Common Pleas, that
19 the judge has granted the motion to take not only the
20 deposition of Mr. Nadeau, the former president, but also to
21 produce the documents that you've referenced, which are almost
22 identical to the documents that have been requested in the
23 subpoena.

24 So as Your Honor has suggested, for purposes of
25 coordination and cooperation, there's no reason for this Court

1 to delay the discovery in the MDL. It should be done
2 simultaneously with the state court, not only to save the
3 time, expenses, and costs of doing it all over again and
4 bringing people back for secondary depositions, but, you know,
5 Secant's counsel has already, you know, proposed the same
6 protocol for a protective order, etcetera, that's in place in
7 the MDL. So the discovery is proceeding.

8 And also remember that they -- we have motions to remand
9 those cases that have been transferred to the MDL, and those
10 are also in front of Judge Goodwin. So Judge Goodwin could
11 make the decision that these cases, as we suggest, don't even
12 rightfully belong in the MDL, they belong in state court, and
13 not even rule on the motion to dismiss but just remand the
14 cases back to the state court. So that can happen as well.

15 And the fact that they're in the MDL is as a result not
16 of what the plaintiffs have done but as a result of what
17 Secant has done in cooperation with Ethicon and Boston
18 Scientific in providing them Mr. Nadeau's affidavit to remove
19 the cases.

20 So, you know, for all those reasons, and more that I'm
21 sure I can think of, I think -- I think Your Honor is correct,
22 and this should just proceed as one discovery operation and
23 not have -- not parcel it out.

24 MR. TUCKER: Your Honor, this is Joe Tucker again on
25 behalf of Secant, and I apologize for interrupting you in the

1 first instance.

2 I think procedurally, or not, I think, procedurally,
3 this -- the cases in the MDL and the state court cases are at
4 different steps. The state court judge denied our initial
5 motion to dismiss. Such a motion is presently pending before
6 Judge Goodwin, and it was only after our motion to dismiss was
7 denied that the judge ordered very limited discovery. And
8 what was clear is that the judge was struggling with some
9 direction from Judge Goodwin on what exactly should and should
10 not be done in the discovery. And that's why -- you know, we
11 don't know the status of Judge Goodwin ruling on this motion
12 to dismiss, but that could set -- that could stop Secant in a
13 lot of different ways from having to go through the expense of
14 what it's going through now, which is exactly what the BAAA
15 was designed to stop what's happening at this very moment, the
16 resources that are being utilized in answering these onerous
17 subpoenas.

18 MR. BALEFSKY: Your Honor, Lee Balefsky again. With
19 all due respect to Mr. Tucker, there's no indication in the
20 record of the argument in front of Judge Massiah-Jackson,
21 Philadelphia County, or in her order that she was
22 struggling -- quote, struggling with the issue and was waiting
23 for Judge Goodwin to do something.

24 She made her own decision based on her interpretation of
25 the BAAA and allowed -- and denied their motion to dismiss and

1 allowed discovery to proceed. There's no -- there's nothing
2 that she's waiting for that Judge Goodwin, with all due
3 respect to him, can provide to her. She's already made her
4 decision, and we're moving forward with discovery.

5 THE COURT: All right. Here's the way that I read
6 the statute. I think that the statute, as it would apply in
7 Ethicon -- I'm presuming that the motions to dismiss that have
8 been filed in the Ethicon MDL, which I have not seen, I
9 assume, however, they're not making any kind of defense based
10 on the quality of the component piece or the failure to abide
11 by contract specifications.

12 As I understand it, the plaintiffs are arguing that
13 Secant is a manufacturer, and Secant is saying it is not a
14 manufacturer. So based on my reading of the statute, the
15 plaintiffs would not be permitted to do discovery, except on a
16 jurisdictional issue, which apparently there isn't one. So
17 that's what I see in Ethicon.

18 In Boston Scientific -- and I've got to admit to you,
19 this makes no logical sense to me. But in Boston Scientific,
20 the plaintiffs can do discovery. They're not limited at all
21 because right now Secant is not a defendant and has not filed
22 a motion to dismiss.

23 On top of that, we have discovery going on in
24 Philadelphia, or in Pennsylvania. So I'm trying to put these
25 pieces together and figure out what would be the most

1 efficient way to handle the issue of discovery. And that's
2 really what I want to hear from Secant. Secant has admitted
3 in its documents that it would be subject to some discovery as
4 a non-party.

5 So my question to you is, why do you want to press the
6 issue in Ethicon when you're going to have to do discovery on
7 Ethicon products? Right now you're subject to discovery in
8 Boston -- on Boston Scientific products. Why do you want to
9 do this stay? How is this benefiting you at all? Isn't it
10 just going to make you have to supply the same things more
11 than once?

12 MR. TUCKER: Not -- not necessarily. I'm sorry.
13 This is Joe Tucker again, Your Honor. And the answer to that
14 question is not necessarily, because depending upon Judge
15 Goodwin's ruling on the issue, we will either be a defendant
16 or a third party subject to the rules governed by Rule 45 of
17 discovery as opposed to 34, and we will have different bases
18 of objection under 45 than we would under 34. And one of
19 these may be the undue burden of cost of obtaining some of
20 these documents.

21 And let me just footnote something, that specifically
22 Judge Massiah-Jackson, the state court judge in this case,
23 when we had our very first case management conference,
24 specifically asked, "What has the MDL ruled on this issue?"
25 And that is the basis for my statement that Judge

1 Massiah-Jackson was looking for some direction from the MDL on
2 this. And we believe that this Court, Your Honor as well as
3 Judge Goodwin, can give some direction and uniformity to this.

4 THE COURT: Well, you say -- you know, you talk
5 about the fact that you're going to have different obligations
6 depending upon whether you're a defendant or a non-party; and
7 to a certain extent, I agree with you. However, even as a
8 defendant, you can still raise undue burden, undue expense as
9 a defense to having to produce unlimited discovery.

10 So I want to know practically -- I'm a very nuts-and-
11 bolts person. I want to know from a practical standpoint what
12 is it you think you wouldn't have to produce as a non-party
13 that you would have to produce as a party, because as far as
14 I'm concerned, you're going to have to start doing some
15 discovery separate and apart from whatever I say.

16 So it seems to me we ought to be coordinating what you're
17 doing so it can be used in the MDLs without you having to do
18 it all over again.

19 MR. TUCKER: Joe Tucker again on behalf of Secant.
20 I agree with Your Honor's general statement. We -- as I
21 initially started off proposing, that we produce in the MDL
22 those documents that we are gathering in the state court.

23 THE COURT: All right. And let me ask the
24 plaintiffs, since you've told me that they're basically
25 gathering everything you've asked for in the MDL, what's your

1 response to that? They're going to offer someone for a
2 deposition, and I assume that Mr. Tucker is not saying that
3 you can't attend it. They're going to produce documents. So
4 what else is it you want right now?

5 MR. TUCKER: Your Honor, this is Joe Tucker again.
6 I am unsure as to whether I'm saying they can't -- they can or
7 cannot attend the state court action, as well as whether or
8 not they can ask questions. I respectfully don't want to
9 agree to that at this point. I need to -- I need to think
10 that through, Your Honor, and I apologize for not being ready
11 for that.

12 THE COURT: Well, I mean here's what I can do. I
13 can grant your motion in Ethicon because I think you're
14 entitled to it under the statute and deny your motion in
15 Boston Scientific because you're not entitled to it at this
16 stage in that MDL, but it brings us right back around to this
17 same point. So I'm open to suggestions.

18 MR. AYLSTOCK: Your Honor, this is Bryan Aylstock on
19 behalf of plaintiffs in Ethicon. We certainly would like to
20 attend that deposition. We'd like the documents produced into
21 the MDL as MDL work product that could be shared. They are
22 certainly relevant not just to a claim against Secant but in
23 our claims against Ethicon. In fact, they're highly relevant.

24 I was looking at a document just today where Dan Smith,
25 who Your Honor is very familiar with, their 30(b)(6) designee

1 on design, is e-mailing back and forth with the Secant folks
2 about certain things and with regard to how and the proper way
3 to do some of the construction on this.

4 So it's very important that we have this discovery, and
5 we've served a subpoena in this MDL so that we, Miss Lewis,
6 the first MDL case, and the others that are coming right
7 behind it, it looks like in waves, have the benefit of knowing
8 not just what Ethicon did, but their interactions with Secant
9 in co-designing this product.

10 It's more than, hey, this is just a supplier. This is a
11 company that holds itself out as the co-designer. It has its
12 own engineers. It has its own specialty folks that interact,
13 according to their own documents and website, with Ethicon and
14 other manufacturers to design the best mesh for implantation
15 in the human body.

16 And so we absolutely do want this discovery and
17 respectfully disagree that the Act would deny Miss Lewis, for
18 example, who has not sued Secant, the benefit of that
19 discovery.

20 THE COURT: All I can say, Mr. Aylstock, is I've
21 read the statute and it's very clear to me that if somebody
22 claims they're a biomaterials supplier and they make a motion
23 to dismiss on one of the grounds contained in the statute and
24 it's not the ground that involves raw materials or component
25 parts not meeting applicable contractual standards, then

1 they -- then no discovery can be done, except on
2 jurisdictional issues. That's what the statute says.

3 You know, it makes -- I can agree with you it makes no
4 sense to me that you can't do discovery on the very basic,
5 fundamental claim that they are a biomaterials supplier and
6 not a manufacturer, but I see nothing in the Act that allows
7 that. So in Ethicon, my understanding is that those motions
8 are pending and that they are not involving any part of the
9 contractual requirements of the component parts. And so what
10 we're left with is the statute saying that no discovery can be
11 done except on jurisdictional issues.

12 MR. AYLSTOCK: But with respect, Your Honor, the Act
13 doesn't address the situation where one plaintiff somewhere
14 else in the country has brought suit against a materials
15 supplier and how that would foreclose the right for another
16 plaintiff who has not done that from getting relevant
17 information that is critical to the claim potentially, and
18 so --

19 THE COURT: Well, I thought -- and I'm not sure.
20 Maybe I'm not understanding procedurally what's happened,
21 because I don't have the motions to dismiss. My understanding
22 is that the motions to dismiss are pending in the MDL and
23 they're not applicable to just a single case or five cases or
24 ten cases, but they're applying to all cases in the MDL.

25 MR. AYLSTOCK: No, Your Honor. Your Honor, I think

1 that's inaccurate. Miss Lewis -- Secant was not named in the
2 master complaint, was not named in the short form complaint.
3 Miss Lewis has never brought a lawsuit against Secant.

4 The motions to dismiss are related only to those cases --
5 and there's -- you know, in the grand scheme of things,
6 there's very few Secant individual plaintiffs who have sued
7 Secant in the Ethicon MDL, extremely few on a percentage
8 basis, and they have not -- they have filed motions to dismiss
9 in those individual cases. There was not -- and there's not
10 in the master complaint. Miss Lewis hasn't done it either in
11 her individual complaint or by adopting any master pleadings,
12 so that's my point.

13 THE COURT: Okay.

14 THE REPORTER: Who is that?

15 THE COURT: That was Aylstock. Yeah, that makes a
16 big difference to me, then, because unless they're a defendant
17 in the MDL for all of the -- all of the suits, then, yeah, I
18 think somebody who hasn't sued them and for whom there is no
19 motion to dismiss pending can do discovery. Now, it would be
20 non-party discovery, but it would be discovery nonetheless.

21 MR. AYLSTOCK: And that's what we served. We served
22 non-party discovery, and, frankly, I had an agreement that
23 they'd answer it, and then I gave an extension, and then all
24 of a sudden there's this motion come up, and it's concerning
25 to me because of the timing of everything.

1 THE COURT: Right.

2 MR. AYLSTOCK: So we would request that it be
3 responded to in an expedited basis given the -- already the
4 delays that we've had and that those folks who -- those
5 Ethicon plaintiffs who have not chosen to sue Secant don't be
6 prejudiced because a handful have.

7 THE COURT: Right. Well, what do you have to say to
8 that, Mr. Tucker? It sounds to me, then, like you don't have
9 the benefit of the statute really for Ethicon or Boston
10 Scientific.

11 MR. TUCKER: Joe Tucker on behalf of Secant. We do,
12 however, Your Honor, have the ability to object to certain
13 aspects of the subpoena under the discovery rules because at
14 the time that it was initially served upon us, we were a third
15 party defendant. We've never filed formal objections to the
16 subpoena. We filed a motion to stay because, as indicated
17 initially, that will determine our ability to object as well
18 as to respond to the actual subpoenas, knowing our status.

19 THE COURT: Well, yeah. What I have in front of me
20 are your two motions to stay. It doesn't sound to me like
21 either one of those motions is going to be granted at this
22 point because Mr. Aylstock made a really good point here.
23 They don't -- you haven't asked for a stay in the MDLs even
24 though all these -- all these briefs and everything were
25 styled such that I assumed they applied to the entire MDL, but

1 they don't.

2 So you really don't -- you really don't have a basis for
3 a uniform stay in every one of these cases. So I'm going to
4 deny those motions.

5 Now, that brings us to what we're going to do with
6 discovery. In both instances, you would be a non-party
7 deponent, a non-party corporation producing documents.

8 How do you want to handle that? How do you all want to
9 handle that?

10 MR. TUCKER: We want to speak with our clients and
11 look at the requests and how they differ from the state court
12 requests and file a formal response to the subpoena. We may
13 object to certain aspects of it.

14 THE COURT: Well, when do you plan on doing that,
15 Mr. Tucker?

16 MR. TUCKER: Well, what I -- again, this is Joe
17 Tucker on behalf of Secant. What I had initially suggested
18 when we got on the call was the rolling submission that we are
19 going to produce in the state court matter, that we produce
20 that under the MDL with the same confidentiality provisions of
21 the MDL, but, yeah -- and I just cannot agree at this point to
22 allow the MDL plaintiffs to be at the deposition, a court
23 matter.

24 THE COURT: Well, I think personally you're making a
25 mistake, because I wouldn't want to keep offering my same

1 corporate witness over and over and over again, but that's, I
2 guess, your choice.

3 Now, that's not going to prevent the plaintiffs from just
4 filing a subpoena that sets the deposition at the same time
5 and at the same place that he's already going to appear. I
6 don't know why you would want to do that, though. Perhaps I'm
7 missing your point, but it seems to me like you're just going
8 to make more of a burden and more trouble for this man who has
9 to appear.

10 MR. TUCKER: Well, in the first instance -- and this
11 is Joe Tucker again. And I -- many of these issues were
12 argued in front of Judge Massiah-Jackson about this being the
13 inappropriate person to be deposed, but I don't want to burden
14 the Court with that discussion because there is someone whose
15 subpoena, whose affidavits that we put forth to the Court in
16 support of our motion for judgment on the pleadings. And for
17 reasons that are irrelevant to this telephone call, the judge
18 decided that on the motion that she had denied, she wanted to
19 have that person deposed instead of the person who executed
20 the affidavit in support of the pending motions in front of
21 the Court.

22 THE COURT: All right. Well, let's talk, then,
23 about what we're going to do as far as the non-party
24 discovery.

25 You have said, Mr. Tucker, that you've received their

1 notice and you understand what documents they want and you
2 would like time to compare that to what you're going to have
3 to produce in the Pennsylvania case and you want to have an
4 opportunity to file objections.

5 MR. TUCKER: Correct.

6 THE COURT: So let's talk about a time frame for
7 that. And let me hear from Ethicon, Boston Scientific, or the
8 plaintiffs as far as what you perceive would be an appropriate
9 time frame in view of the status of the cases as they're
10 moving forward to trial.

11 MR. AYLSTOCK: Your Honor, Bryan Aylstock on behalf
12 of the plaintiffs. And just a little bit of background here.
13 I guess it was probably six weeks ago we got a call, because
14 the subpoena was coming due, and they requested some more
15 time, and I got on the phone, and what I like to do, I said,
16 "Fine. How much time do you need?"

17 "Well, we need another week, and then we can respond to
18 your subpoena." And I said, "Okay. We can live with that."

19 And instead of responding to the subpoena, we get,
20 without any meet-and-confer, this motion to stay that
21 completely -- had no idea. They didn't disclose any of that.

22 They were -- apparently were prepared to respond to the
23 subpoena about five weeks ago. I don't know the volume of
24 documents, but I suspect it to be somewhat substantial given
25 their involvement and what we've seen so far. And so we would

1 like the documents within a week, because that was the
2 extension that I gave five or six weeks ago. "Can I have a
3 week?"

4 "Yes, you can have a week." So I'd like it to be here in
5 a week.

6 THE COURT: Mr. Tucker, what are we talking about on
7 your end as far as your -- the status of your document
8 collection?

9 MR. TUCKER: The beginning of January, Your Honor.

10 THE COURT: Beginning of January.

11 MR. TUCKER: Yes.

12 THE COURT: All right.

13 MR. TUCKER: We're going to start a rolling
14 production the end of this month is our expectation.

15 MR. BALEFSKY: Your Honor, Lee Balefsky for the
16 plaintiffs in the Pennsylvania cases. The judge order in
17 Philadelphia requires the documents to be produced by
18 December 24th, I believe.

19 THE COURT: Okay.

20 MS. WAGSTAFF: Your Honor, this is Aimee Wagstaff
21 for the Boston Scientific plaintiffs. And before we could
22 agree to some sort of rolling production, I would just ask
23 that Secant let us know about how many documents they think
24 they're going to be producing, you know, if they're producing
25 a hundred thousand documents every two weeks or a hundred or

1 what sort of the scope is, because like Mr. Aylstock said, we
2 too agreed to an extension for them to produce documents
3 pursuant to the subpoena, and our exact response to them was
4 we would not oppose a response -- or an extension as long as
5 they provided responsive documents. And then as well, without
6 a meet-and-confer, we received the motion to stay.

7 So I'd like to know what sort of scope of documents they
8 intend to produce, if they know.

9 THE COURT: I think that's a good question.

10 MR. TUCKER: I'm sorry. This is Joe Tucker again on
11 behalf of Secant. At this point, we anticipate we'll have
12 more than a hundred thousand pages of documents pursuant to
13 their request, and we will have addressed about 80 percent of
14 the requested materials in plaintiffs' 62 separate requests.

15 THE COURT: When do you --

16 MR. TUCKER: And --

17 THE COURT: Now, when do you -- when do you think
18 you're going to have 80 percent of the documents? By the end
19 of December?

20 MR. TUCKER: Yes. And we wrote, as Mr. Balefsky is
21 aware, we sent a letter to the judge today telling them that
22 we would be producing on a rolling basis between the 24th of
23 December and January 3rd more than a hundred thousand
24 documents. And the actual date of the requirement is
25 December 25th, Christmas Day.

1 We are making a good faith effort to comply with this,
2 but we told the judge in no -- we wrote a letter, which
3 Mr. Balefsky was copied on, that it's virtually impossible to
4 comply with the Court's order within the timetable provided.
5 And I can't help -- I would be remiss if I didn't go back and
6 keep saying this is specifically what the BAAA didn't want
7 small companies like Secant to go through, this very arduous
8 procedure that we're going through with gathering these
9 hundreds of thousands of documents.

10 MS. WAGSTAFF: Your Honor, this is Aimee Wagstaff
11 again for the Boston Scientific plaintiffs, and I would ask
12 Secant if they anticipate that their productions under the two
13 subpoenas in the MDL, meaning the Ethicon and the Boston
14 Scientific plaintiff subpoenas, will result in the same
15 productions, or are you -- when you say a hundred thousand
16 documents, are you thinking that you're going to produce a
17 hundred thousand in the Ethicon MDL and then a hundred
18 thousand as well in the Boston Scientific MDL?

19 MR. TUCKER: The only thing -- this is Joe Tucker on
20 behalf of Secant in the state court matter. The only
21 representation I am making is as to Mr. Balefsky's document
22 production requests which we are willing to produce for the
23 Ethicon defendants in the MDLs, there will be more than a
24 hundred thousand documents. I believe Boston Scientific on
25 behalf of Secant will speak as to their documents.

1 MS. STUBBS: Jennise Stubbs on behalf of Secant for
2 the Boston Scientific products. We do not have as many
3 documents as Mr. Tucker is explaining for the Ethicon
4 products. There are more in -- you know, below a hundred
5 thousand-page range for these documents, and we have always
6 said that we can produce these documents as a third party, but
7 we're asking for clarification from the Court because of the
8 limbo that Secant feels as being a party and a non-party.

9 We understand from the Court that you are saying that
10 because we are a non-party, we need to go forward with this
11 and are willing to do that. I do want to clarify that
12 Miss Wagstaff's statement, with all due respect, is not -- is
13 not accurate.

14 We did not say that we would produce documents at the
15 time of the extension date. We agreed that we would disclose
16 the areas of production by October 30th, and we reached out
17 to them and had a discussion with Mike Moreland, who's
18 co-counsel with Miss Wagstaff, and have produced those areas
19 of production.

20 We can produce the documents that are subject to the
21 subpoena early January.

22 MS. WAGSTAFF: This is Aimee Wagstaff. Do you
23 anticipate, Miss Stubbs, producing them in one production, or
24 are you suggesting a rolling basis? Because we're okay with
25 early January if we could just have a hard date that you'll

1 produce by.

2 MS. STUBBS: Yes, we plan, just as we have -- Your
3 Honor, we have another -- another defendant in many of these
4 cases that's a biomaterial supplier where we have already
5 produced documents to Miss Wagstaff and others. And so we
6 plan on doing the same thing, which would be the bulk of the
7 production would be in early January. And if there is any
8 other document that we ascertain to be responsive to the
9 subpoena, we would produce that at a later date.

10 THE COURT: When you say early January, Miss Stubbs,
11 what do you mean?

12 MS. STUBBS: Well, given the holidays, I would
13 like -- and just that we are working with a small company that
14 is not used to all of this litigation and is definitely not
15 comfortable with all of this, I would like, you know, by
16 January 10th, you know, a little into January so that we can
17 have some time to make sure that we have a complete production
18 from them.

19 THE COURT: Miss Wagstaff, is January 10th
20 agreeable with you?

21 MS. WAGSTAFF: That is. That's agreeable with us if
22 it's -- if it's the bulk of the production.

23 THE COURT: All right. Well, then, as far as
24 Ethicon goes, I hear Mr. Tucker saying he'll begin a rolling
25 production December 24th and it will be finished by January

1 the 3rd.

2 I don't think that is so much longer, Mr. Aylstock,
3 particularly with the holidays in between. That seems
4 reasonable to me.

5 And then with Boston Scientific, I'm going to deny the
6 motion to stay, and they'll produce documents by January the
7 10th.

8 So now that takes care of dates for document production.
9 Do we have other issues related to the document production?

10 MS. WAGSTAFF: Your Honor, this is Aimee Wagstaff,
11 and I would just like to maybe nip something in the bud before
12 it becomes an issue.

13 If, in fact, those 26 cases that Miss Stubbs was talking
14 about do get transferred over, as it sounds like they might, I
15 just want to make sure your order would stand so that we're
16 not back on this phone call in another week and a half.

17 THE COURT: Definitely. I was under the impression
18 that this issue related to all the cases in the MDL, because
19 that's what the pleadings that I received say. But what I
20 heard Mr. Aylstock say is that's not true; these motions have
21 only been filed in the sprinkling of cases that involve Secant
22 as a named defendant.

23 MS. STUBBS: Your Honor, Jennise Stubbs for Secant.
24 It was my understanding that the subpoena, the third party
25 subpoena was issued from multiple plaintiffs in the MDL, and

1 then we responded in response to that subpoena and for all of
2 those cases.

3 So it never was my impression that we were responding in
4 just one or two cases and that the request was only in one or
5 two cases. And that's why I'm having a little bit of
6 difficulty understanding the ruling as to Ethicon which could
7 impact Boston -- Secant as to Boston Scientific products in
8 the future, because the BAAA is supposed to protect from
9 discovery, and we're basically saying that there's some
10 loophole in here that allows some sort of discovery before a
11 motion to dismiss is decided, which the statute really
12 contemplates happening as an initial matter to not burden
13 these companies.

14 THE COURT: I think the problem is that you're
15 dealing with an MDL and you're not a defendant on the master
16 complaint. So all they have to do is they could just subpoena
17 these documents from you from one -- one plaintiff.

18 MS. STUBBS: But they haven't subpoenaed them from
19 just one plaintiff. Our subpoena was issued from numerous
20 counsel.

21 THE COURT: Well --

22 MS. STUBBS: -- in the MDL, and there's no
23 reference -- I'm looking at the subpoena right now. There's
24 no reference to just one or two cases --

25 THE COURT: Well, what I'm saying, though, is from a

1 practical standpoint, it doesn't make any difference. The
2 only time the statute is going to protect you is if you're a
3 defendant and you've made a motion to dismiss.

4 I think you all agree -- you've all agreed that if you're
5 a non-party, you have some duty to respond to a subpoena. I
6 think everybody has agreed to that, as far as what I could
7 see. And my point is, if you're not a defendant in every one
8 of these MDL cases, then they could just pick any one of the
9 ones they want to where you're not a defendant and subpoena
10 these records.

11 So from a practical standpoint, you're on the hook as a
12 non-party since you're not a defendant in all of them.

13 MS. WAGSTAFF: I agree with you, Your Honor. This
14 is Aimee Wagstaff. And responding to what Miss Stubbs said,
15 the reason the subpoena -- she's representing Boston
16 Scientific, and the reason the subpoena is for all of the
17 plaintiffs in that particular situation is because at the time
18 of issuance and as we sit here talking today, Secant is not a
19 defendant in MDL 2326 in any case.

20 THE COURT: But, you know, I'm just saying you don't
21 want to worry too much about the form and ignore the
22 substance. And the substance of this is, for every case
23 you're not a defendant, you don't have the benefit of this
24 statute. And there's plenty of cases in the MDLs where you're
25 not a named defendant but your documents might still be

1 relevant. So I'm not sure it's a battle worth fighting.

2 MS. WAGSTAFF: I agree, Your Honor.

3 THE COURT: And I don't know whether -- I don't
4 know -- Secant, are you going to insist that -- and especially
5 in the Ethicon situation, that the subpoena -- I don't know,
6 did you issue the subpoenas in the names of the people that
7 sued Secant or did you issue them on some other -- for some
8 other plaintiffs?

9 MR. AYLSTOCK: No, Your Honor. This is Bryan
10 Aylstock. We issued them on behalf of the plaintiffs, you
11 know, the MDL; and that, of course, would include Miss Lewis,
12 who certainly did not sue Secant. There is no motion to --

13 THE COURT: So your subpoena was issued on behalf of
14 all the plaintiffs in the MDL.

15 MR. AYLSTOCK: Yes.

16 THE COURT: Okay. And in some of those plaintiffs,
17 Secant would have the benefit of the statute.

18 MR. AYLSTOCK: Well, at the time of issuance, none
19 of those plaintiffs were in this MDL, but I see your point,
20 but I think it's a distinction without a difference.

21 THE COURT: I agree. But I wanted to know whether
22 Secant thinks there's a difference.

23 MS. STUBBS: Well -- Jennise Stubbs on behalf of
24 Secant. We just -- we understand that, and I am with you on
25 that there are other cases, and at the beginning of all this,

1 we understood that getting at a third party subpoena, Secant
2 was, you know, obligated to respond to that as a third party.

3 It has complicated the issue with the transfer of these
4 cases and with all of -- since the original subpoena was
5 issued as to Secant, numerous cases in Philadelphia state
6 court were filed against it. So it was not even a defendant
7 whenever the initial subpoena went out, it was not a defendant
8 in the Philadelphia state court.

9 Secant then became a defendant in the Philadelphia state
10 court. We removed many of those cases, and Boston Scientific
11 removed all of the cases except for one that is still pending
12 in Philadelphia state court. So there are many cases that are
13 now pending in the federal court; and any day now, the party
14 status will change as to Secant in the MDL. And that's why we
15 felt that we needed to file the motion to stay, because we
16 wanted some clarity and also we saw what was going on in the
17 Ethicon litigation.

18 We completely understand that Secant is obligated to
19 produce on -- as a third party. Where the rub comes down is
20 that under the BAAA, if we are a party in the case, under the
21 BAAA, we don't have to go through any discovery, we are
22 entitled to a decision on the motion to dismiss as an initial
23 matter, and so we don't want it to be that we are being
24 required to give more -- to do more discovery, which will
25 burden the company even more than already is being asked of

1 them as a third party, because there's some issue regarding
2 the party status and non-party status. But the party status
3 is wrapped up all in a motion to dismiss.

4 THE COURT: Well --

5 MS. STUBBS: So if I'm making myself clear, it's --

6 THE COURT: Yes. No, I do --

7 MS. STUBBS: -- the burden on Secant of what kind of
8 production plaintiff is expecting from them.

9 THE COURT: Right. I understand and -- I understand
10 what you're saying and I agree with you. I think what we're
11 talking about is a non-party production. But to me it doesn't
12 sound like it's going to make a whole lot of difference when
13 you get right down to it.

14 MR. BALEFSKY: Your Honor, Lee Balefsky. I just
15 want to make it clear that, you know, it's Secant and Boston
16 Scientific and Ethicon who've availed themselves of the MDL by
17 removing all of these cases. So I mean they've put themselves
18 in the position that they're in. And, you know, they've got
19 to live -- you know, if you live by the sword, you've got to
20 die by the sword, so to speak.

21 So the only thing I'm concerned about -- and I know
22 you're talking about production in the MDL. From the
23 standpoint of Pennsylvania, I just don't want Mr. Tucker to
24 think that because I've remained silent that the letter he
25 wrote this morning to Judge Massiah-Jackson that I agree with

1 it, because I don't.

2 In that letter he indicates that he's only going to
3 produce 80 percent of the requested documents in the
4 Philadelphia litigation and he's going to leave out 20 percent
5 of the documents, which may be some of the most important, you
6 know, documents. So I haven't agreed to that at all. I just
7 want to make that clear --

8 THE COURT: All right.

9 MR. BALEFSKY: -- for the record. The other
10 question I have in terms of procedurally is in what format
11 those -- need to produce these documents. I think that's very
12 important.

13 THE COURT: Okay. Well, that's right where I was
14 going before we got off on this tangent. But to answer your
15 question, Miss Wagstaff, if -- if they do become a defendant
16 in some of these cases in Boston Scientific and they file
17 motions to dismiss, that's not going to change anything as far
18 as their production as a non-party. So we're going to move
19 forward with this and we're not going to have any more
20 telephone calls about this same issue. I think we've got this
21 worked out.

22 So now we've got some dates and we've got some document
23 production that's going to be done. The next question is, how
24 are they going to be produced, because I remember that was a
25 concern on Secant's behalf as far as the ESI protocols in

1 these cases.

2 MR. TUCKER: Your Honor, this is Joe Tucker on
3 behalf of Secant. A decision has not been made as to how we
4 are going -- in what form we're going to produce these. We're
5 working through that. And that's -- and that's the best
6 answer I can give at this point.

7 THE COURT: All right. Well, I want you to work
8 with the plaintiffs to try to figure out how to do this in a
9 way -- and I'm not -- and I'm not saying that just because I
10 want the plaintiffs to get the documents that they think they
11 need. I want to do that for your client as well, because I
12 don't want you to have to produce the same documents over and
13 over again.

14 MR. TUCKER: Is the Court by that -- this is Joe
15 Tucker again, Your Honor. By that, is the Court suggesting
16 that the plaintiffs pay the costs of this?

17 THE COURT: No, I'm not suggesting that. There's
18 been no motion to that effect. If you want to make a motion,
19 then you are more than welcome to do that about --

20 MR. TUCKER: Should I make a formal -- should I make
21 a formal motion, or is it appropriate to make it now on the
22 phone?

23 THE COURT: It would be more appropriate to do it in
24 writing because there's a whole body of case law on that very
25 subject.

1 MR. TUCKER: Understood.

2 THE COURT: All right.

3 MS. WAGSTAFF: Your Honor, this is Aimee Wagstaff,
4 and I see dates that we've agreed to in my head coming out in
5 your order, and I would suggest that -- you know, I did say
6 that Boston Scientific is fine with January 10th, and we
7 still are. I'm just concerned that not knowing -- this
8 rolling production makes me nervous because I'm not quite
9 sure, you know, when we're going to get the last production,
10 and we now have a trial date set in March, and obviously
11 February we'd like to dedicate to sort of refining our trial
12 package instead of looking at new documents.

13 So I would request that the production be completed by
14 January 20th, which gives them from the date we served the
15 subpoena, you know, five months or so to produce and allows
16 ten days of production.

17 MS. STUBBS: This is Jennise Stubbs for Secant. I
18 just want to clarify. I didn't say that we were going to have
19 rolling production. I said the vast majority of everything
20 that we would be producing would be on the 10th. If we did
21 find something after that, we would produce that as well if we
22 felt that it was responsive. I mean I don't have a problem
23 with agreeing to that, but I did want to clarify that we --
24 you know, the 10th, we will shoot to producing as much as we
25 can on that date.

1 THE COURT: All right. So we do have dates, and
2 you're going to work on the form of the production, as I
3 understand it. And let's try to get something worked out on
4 that pretty quickly. Well, you're going to have to, because
5 the documents have to be produced in just a few weeks.

6 So is there anything else on the document production end
7 of it?

8 MR. AYLSTOCK: That's all we have, Your Honor.
9 Bryan Aylstock.

10 THE COURT: All right. Now, is there any other
11 discovery that is outstanding with Secant that needs to be
12 addressed today, or is that something that the parties would
13 like to work out themselves?

14 MR. AYLSTOCK: Again, this is Bryan on behalf of the
15 plaintiffs. We would like the opportunity to look at those
16 documents, you know, after we've digested them, perhaps take
17 some depositions, but I think it's, at least in the MDL,
18 somewhat premature, although I would note the deponents that
19 are coming up in Philadelphia Court of Common Pleas I know for
20 a fact we'll probably want --

21 THE REPORTER: I'm sorry?

22 THE COURT: -- want both of them. All right. Well,
23 I'm going to let you -- then you guys try to work out what you
24 want to do with the witnesses. It sounds like you're going to
25 need the documents first anyway. And, you know, maybe by the

1 time you get the documents and you've heard what the witnesses
2 have said in the Philadelphia court, you're not going to want
3 to go any further with this anyway, so --

4 MR. TUCKER: This is Joe --

5 THE COURT: Yes, go ahead, Mr. Tucker.

6 MR. TUCKER: Yes, Your Honor. This is Joe Tucker
7 again on behalf of Secant. Again, I want to go to where I
8 started off, if these are our concluding words before you end
9 the conference, is that a lot of direction and guidance can be
10 given simply by Judge Goodwin ruling on the motions. And I
11 don't know if you and Judge Goodwin are in communication with
12 each other, but, you know, on behalf of those defendants who
13 are subject to the BAAA and those protections of the BAAA, a
14 ruling by Judge Goodwin on this issue will go a long way with
15 helping to resolve a lot of these issues that are presently
16 before this Court and which are presently burdening us,
17 Secant, its officers, its administration, its administrative
18 and its manufacturing process. And we just implore the Court,
19 to the extent that we can, that if you could have
20 communication with Judge Goodwin about a timing on this, it
21 would be greatly appreciated.

22 THE COURT: Certainly. I will mention to Judge
23 Goodwin your concerns and your desire to have the motions
24 determined as soon as possible.

25 MR. AYLSTOCK: And, Judge Eifert, this is Bryan

1 Aylstock on behalf of the plaintiffs. I probably butted in
2 before Lee had a chance -- or Mr. Balefsky had a chance, but
3 also pending are motions to remand, which, of course, are
4 jurisdictional in nature and need to be handled as such, with
5 subject matter jurisdiction being the issue. And we certainly
6 request that those also be heard, in fact, possibly heard
7 before the motion --

8 THE COURT: I will pass that message along as well.

9 MR. AYLSTOCK: Thank you, Your Honor.

10 THE COURT: Is there anything else, then, we need to
11 do today?

12 MR. AYLSTOCK: No, Your Honor.

13 THE COURT: All right. Thank you. Goodbye.

14 UNIDENTIFIED SPEAKER: Thank you, Judge.

15 (Hearing concluded at 3:57 p.m.)
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21 I, Teresa M. Ruffner, certify that the foregoing is a
22 correct transcript from the record of proceedings in the
23 above-entitled matter.
24

25 /s/Teresa M. Ruffner

December 23, 2013